

STATE OF COLORADO

Colorado General Assembly

Mike Mauer, Director
Legislative Council Staff

Colorado Legislative Council
200 East Colfax Avenue Suite 029
Denver, Colorado 80203-1716
Telephone 303-866-3521
Facsimile 303-866-3855
TDD 303-866-3472



Dan L. Cartin, Director
Office of Legislative Legal Services

Office of Legislative Legal Services
200 East Colfax Avenue Suite 091
Denver, Colorado 80203-1716
Telephone 303-866-2045
Facsimile 303-866-4157
Email: olls.ga@state.co.us

MEMORANDUM

TO: Jason Legg and Scott Cadiz

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: April 10, 2017

SUBJECT: Proposed initiative measure #30, concerning voter registration through public entities

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment to the Colorado Revised Statutes to be:

1. To require public entities that, in the normal course of business, collect and maintain records containing the legal name, age, residence, citizenship, identification information, and signature of individuals to provide those records to the secretary of state for each person qualified to register to vote;

2. To require the secretary of state to provide the record of any individual who is a qualified unregistered voter to the county clerk of the county in which such person may be registered as an elector;
3. To require the secretary of state to notify each person whose records are provided to a county clerk of the processes to decline being registered as an elector and to choose a political party affiliation;
4. To give such persons the opportunity to decline being registered to vote by imposing a twenty-one day waiting period between the time the secretary of state issues the notification of the declination process and the time when the person is registered as an elector; and
5. To require the secretary of state and public entities to adopt rules to implement the proposed initiative and specify particular requirements for those rules.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. Under section 1-40-105.5, Colorado Revised Statutes, the director of research of the legislative council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.
 - a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
 - b. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and if so, when do you intend to do so?
 - c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the legislative council staff at BallotImpactEstimates.ga@state.co.us.

- d. What types of costs do the proponents anticipate that public entities, the Secretary of State, and county clerks and recorders will incur in implementing the proposed initiative?
3. Regarding the terminology appearing in the proposed initiative:
 - a. The term "county clerk" is used throughout the proposal. As this term is not defined, and the "Uniform Election Code of 1992" uses such official's full title, please consider modifying the references to be "county clerk and recorder".
 - b. Which entities comprise "public entities" subject to the proposed initiative? State and local departments, agencies, bureaus, board, commissions, and subdivisions of such entities? Would the term include purely advisory bodies? Instrumentalities of the state, special purpose authorities, quasi-governmental entities (e.g., PERA)? Special districts? State and local law enforcement agencies, courts, correctional facilities, jails? School districts and public institutions of higher education? Public entity insurance pools? How would an entity know whether it is a "public entity" that is subject to the requirements of the proposed initiative? Would the proponents consider clarifying the term?
 - c. What constitutes "citizenship information"? What types of records contain this information so that this prong is satisfied?
 - d. What is meant by the term "identification information"? How does "identification information" differ from the records containing a person's name, age, residence, etc.? Is this term related to "identification", which is defined for the "Uniform Election Code of 1992" (see section 1-1-104 (19.5), C.R.S.)? Would the proponents consider defining, describing, differentiating, or otherwise clarifying what is meant by "identification information"?
 - e. What is the purpose of 1) requiring public entities to maintain this personal information; 2) of sending such records to the Secretary of State; and 3) of the Secretary of State notifying voters?
 4. Under subsection (1) of new section 1-2-230, C.R.S., a public entity that "in its normal course of business" collects the enumerated types of information is subject to the data-sharing requirement of the proposed initiative.
 - a. There may be instances where a public entity would collect some, but not all, of the required pieces of information. In those cases, it appears

that the public entity would not be subject to the proposed initiative's information-sharing requirement; is that your intent (or would the public entity have an obligation to attempt to collect all of the required pieces of information)? Would passage of the measure possibly cause a public entity to change its policies or procedures to either collect more information (to either facilitate the voter registration of more people) or less information (to avoid having to submit the information to the Secretary of State)?

- b. Would receiving the described information from persons applying for employment with a public entity constitute the "normal course of business" for that public entity, such that the personal information provided by such prospective employees would be subject to the proposed initiative?
 - c. At the time that a public entity collects the records described in subsection (1), will there be any notification provided to the person that his or her information could be used to register the person to vote? Have the proponents considered enabling persons to choose not to be registered to vote at the time the public entity collects the information, rather than solely through the declination process?
5. According to subsection (1) of new section 1-2-230, C.R.S., of the proposed initiative, a public entity must forward information relating to each person "qualified to register to vote". How is such qualification to be determined? Is a public entity in the best position to make this threshold determination? Will public entities be provided training or other resources to learn how to make this initial finding?
6. Regarding the transmission of personal information from public entities to the Secretary of State (and in the case of qualified unregistered electors, county clerks and recorders) under subsections (1) and (2):
- a. What privacy protections are, or would be, in place for people seeking government services? Are the proponents concerned that someone may not seek a government service because they do not want his or her personal information shared with the Secretary of State and county clerk and recorder?
 - b. The proposed initiative does not specify how frequently a public entity must transmit potential electors' information. Is this something that each public entity decides for itself (through the rulemaking required under

subsection (4) of the proposed initiative), or would a patchwork of transmission schedules be administratively infeasible? Similarly, how often must the Secretary of State provide county clerks the information of unregistered qualified electors? Would the proponents consider including a schedule by which the transmissions must be made or clarifying how (and by whom) the timing will be decided?

- c. The proposed initiative makes no exception for personal information that may by law be deemed confidential. Is it the proponents' intent that the information-sharing required by the proposed initiative will preempt any conflicting law?
7. Regarding the procedure by which a person may decline to be registered to vote, is the declination valid for some length of time, or must the person continue to decline to be registered after each qualifying interaction with a public entity subject to the proposed initiative? If the former, how long does the declination last? If the latter, is that unduly burdensome on persons who affirmatively decide not to register to vote yet who have many occasions to transact with public entities that are subject to the proposed initiative?
8. Subsection (4) of the proposed initiative prohibits a county clerk from sending a ballot or adding to the registration list a person registered through the process described in the proposed initiative until at least twenty-one days after the Secretary of State issues such person the notice of declination and affiliation processes. How will a county clerk and recorder know the date that the notification is issued? Must that notification be issued the same day that the Secretary of State provides the county clerk the elector's information under subsection (2) of the proposed initiative? Would the proponents consider clarifying this point?
9. Currently, persons who are sixteen or seventeen years of age may preregister to vote, and they are automatically registered when they become eighteen years old. The proposed initiative does not appear to apply to such persons (i.e., it does not create a process of automatic *preregistration*). Is this the proponents' intent?
10. To minimize confusion, would the proponents consider rewriting the first sentence of subsection (3) to eliminate the double negative used with reference to the choice not to be registered?
11. How does the proposed initiative affect entities that currently facilitate voter registration? For example, a driver's license examination facility must give an

- eligible elector the opportunity to register to vote when he or she applies for a driver's license or identification card. If enacted, is the proposed initiative's automatic voter registration process intended to supplant this requirement (and if so, would this comport with the requirements of the "National Voter Registration Act of 1993", which mandates that a voter registration form, including an attestation, be made part of an application for a state driver's license)? Or must such facilities continue to provide electors the opportunity to register, despite the fact that they may be registered pursuant to the process set forth in new section 1-2-230, C.R.S.?
12. How would the proposed initiative affect current detailed requirements in other statutory provisions governing voter registration, declaration of party affiliation, notice to voters, and related matters? Do the proponents anticipate that, if the proposed measure is approved, the general assembly will need to pass legislation to harmonize the proposed initiative with existing law?
13. Under subsection (6) of the proposal:
- a. Public entities are required "to adopt rules necessary to implement [section 1-2-230, C.R.S.]". Must the rules be adopted in accordance with the "State Administrative Procedure Act"? What about public entities who currently do not enjoy rulemaking authority? Must public entities and the Secretary of State confer on the rules adopted?
 - b. Rules must be adopted that provide for the provision of notice to persons being registered under new section 1-2-230, C.R.S., of the waiting period and other methods to register to vote. Who provides such notice, and at what point in the process?
 - c. Would the exemptions from sections 1-2-204 and 1-2-205, C.R.S., cause any inequity between voters? For instance, some electors may be subject to a misdemeanor for falsifying a self-affirmation while other would not be who passively registered to vote.
14. In accordance with article V, section 1 (4) of the state constitution, if the proposed initiative is adopted at the 2018 general election, it takes effect "from and after the date of the official declaration of the vote thereon by proclamation of the governor". Given the amount of time accorded for the vote to be canvassed and the official declaration of the vote to be issued, it is not uncommon for that declaration to be made after January 1 in the year immediately following the election. Additionally, public entities may need some

time to implement practices and procedures to implement the proposed initiative. In light of the foregoing, is January 1, 2017, a feasible effective date?

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. Headnotes do not comprise statutory text but are included "only for the purpose of convenience, orderly arrangement, and information". The headnote to new section 1-2-230, C.R.S., would not seem to sufficiently apprise readers of the unique process by which voter registration through public entities is accomplished. Would the proponents consider modifying the headnote so that the "passive" or "automatic" nature of public entity voter registration is conveyed?
2. When speaking about public entities, the correct pronoun is "that" and not "who" (see subsection (1) of the proposed initiative).
3. New statutory text is shown in small capital letters, but new nonstatutory text is not. To conform to standard drafting practices and make the proposed initiative more reader-friendly, please consider updating the paragraph divisions in subsection (2) of the proposed initiative to be "(a)" and "(b)" rather than "(A)" and "(B)".
4. Numbers are typically written out. Please consider replacing the instances of "21" in subsections (3), (4), and (6) of the proposed initiative to read "twenty-one".
5. It is standard drafting practice when referencing statutory sections to include the word "section" before the number and not "C.R.S." (see subsection 5 of the proposed initiative). For example, "section 24-35-204.5."
6. In subsection (6) of the proposed initiative:
 - a. You reference the "National Voter Registration Act of 1993." It is standard drafting practice to also include the federal cite of the act, i.e., "'National Voter Registration Act of 1993', 52 U.S.C. sec. 20501, et seq., as amended."

- b. Parentheses should be added to make the internal reference to "subsection 4" read "subsection (4)".
- 7. Subsection (7) of the proposed initiative provides that "[t]he provisions of this section shall be effective as of January 1, 2019." Modern drafting practice avoids use of false imperatives (i.e., when the word "shall" is used to indicate a legal result rather than a command). Additionally, the phrases "the provisions of" and "as of" in this sentence are surplusage. In light of these points, please consider phrasing this subsection: "This section is effective January 1, 2019."